

ORIGINAL

PATTON BOGGS LLP
ATTORNEYS AT LAW

EX PARTE OR LATE FILED

RECEIVED

FEB 16 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 16, 2000

Stephen Diaz Gavin
(202) 457-6340
SGavin@pattonboggs.com

VIA COURIER

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation
WT Docket 98-169

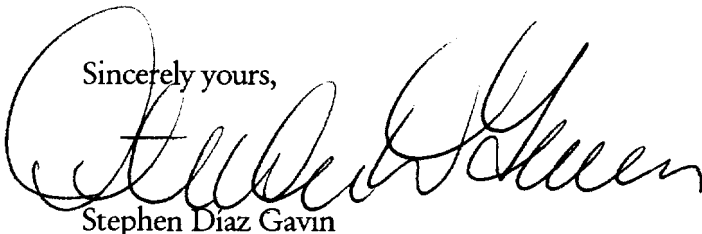
Dear Ms. Salas:

By this letter and pursuant to Section 1.1206 of the Commission's Rules, I hereby notify the Commission that on February 16, 2000, on behalf of U.S. Telemetry Corporation, as well as various clients who are 218-219 MHz licensees, I met with Commissioner Susan Ness and Mark Schneider, Senior Legal Advisor to Commissioner Ness. I was accompanied by my partner, J. Jeffrey Craven, and Thomas L. Siebert, President of U.S. Telemetry Corporation.

The meeting consisted of discussions relating to various 218-219 MHz licensee eligibility status for amnesty or restructuring of debt, election dates and certain bankruptcy issues. In addition, two position papers were presented to Commissioner Ness and Mr. Schneider, copies of which are attached hereto.

If you should have any questions, please contact the undersigned counsel.

Sincerely yours,



Stephen Diaz Gavin

cc: The Honorable Susan Ness
Mark Schneider, Esq.

No. of Copies rec'd 071
List A B C D E

Amnesty and Restructuring Options In 218-219 MHz Service Need Streamlining

Issue: The Commission should simplify 218-219 Service eligibility for restructuring or amnesty to prevent further delays in the development and provision of service in the 218-219 band. After its great efforts to devise a mechanism to restructure the 218-219 Service licenses, provided they could be found to be “eligible” for the Commission’s various amnesty and restructuring programs, the Wireless Bureau has unfortunately begun interpreting the amnesty options in a manner that produce the anomalous outcomes. For example, a licensee that made its 20% downpayment and one or more of its interest installments, but thereafter filed its grace period request late or not at all, will be declared ineligible, while a licensee that merely made its 20% downpayment and thereafter filed a single grace period request is “eligible.”

Policy Option: The Commission should simplify the restructuring options so that there can be a “bright line” test, less susceptible to claims of arbitrary and capricious action: **no eligibility for amnesty or restructuring unless an applicant at least met its 20% downpayment obligation.** Further, the Commission should make information about eligible licenses available to the public.

Rationale:

- **Rules Not Yet Final.** The FCC recently extended the deadline for Petitions for Reconsideration of the September Order on 218-219 until 2/29/00, with replies due 10 days thereafter. Thus, the rules on which licensees must make elections are not even yet a final order. Licensees ought to have final rules before they must make decisions of such consequence.
- **Simple fairness:** Small business, undercapitalized licensees who made their 20% downpayments and maybe even some installment payments, despite the absence of technology to use on the 218-219 MHz band, are now being prevented from electing to restructure and resume payments because they might have erroneously interpreted what the Commission must concede were complex, arcane rules on timely payments and grace periods.
- **Harm to female and minority businesses:** Arbitrary interpretation of restructuring and amnesty eligibility disproportionately impacts small businesses controlled by female and minority investors, who form a large portion of the ownership of 218-219 Service licensees. Such a result would run contrary to Congressional directive that the Commission provide “economic opportunity for a wide variety of applicants, including...businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(4)(C).
- **Delay in service to the public:** Arbitrary application of the licensee eligibility rules prevents U.S. Telemetry, in joint venture with existing licensees, from bringing to the market a viable technology for the 218-219 MHz band. As is being demonstrated by its test system in Baton Rouge, U.S. Telemetry finally offers a viable technology solution for a service that has to date been characterized by hyperbole, false promises and undercapitalized licensees, all of which have resulted in the spectrum’s lying fallow for 6 years since the initial licenses were awarded.
- **Full payment of licensee obligations:** U.S. Telemetry will be seeking assignment of existing licenses to joint ventures owned by U.S. Telemetry and existing licensees. It seeks no special deal and will result in a better outcome for the Treasury: **U.S. Telemetry will assume the full license payment obligations of eligible licensees.**

218-219 Eligibility Simplification

Page 2

- ◆ Prompt resumption of payments by the U.S. Telemetry joint ventures and fulfillment of licensee payment obligations and will result in a better outcome for the Commission than taking back licenses for a reauction, which will only delay the ability to offer service on a nationwide basis.
- New options already being made available to ineligible licensees: The Commission's September 1999 amnesty options have already not proven to be "hard and fast" rules: the FCC staff has already begun stepping back from the September 1999 order by indicating that it will offer refunds of installment payments to licensees that would initially have been ineligible under the original rules.
- No future installment payment licenses: The need for deterrence by strict enforcement of installment payment rules has diminished because the Commission will offer no future installment payment options in any wireless or broadcasting service.
- Secrecy about eligibility impedes license restructuring: The reluctance of the Wireless Bureau to make public information about which licenses are eligible for restructuring or amnesty impedes the ability of a technology provider like U.S. Telemetry to bring to the attention of licensees the availability of heretofore unavailable technology solutions. The fact of eligibility does not impede privacy concerns or confidential financial information.

Processing of Assignment of Wincom-Affected 218-219 Service Authorizations To U.S. Telemetry Is Consistent With Commission Precedent

Issue: During 1995 and 1996, when it appeared that there were few alternatives for IVDS licensees other than default, many companies entered into contracts to sell their authorizations to Wincom Corporation ("Wincom"). Many such companies did so on the expectation (subsequently proven erroneous) that Wincom would assume obligations for future installment payments to the Commission. In 1998, Wincom filed for bankruptcy protection and is currently being liquidated under Chapter 7 of the Bankruptcy Code. The Bankruptcy Court has found that Wincom's contractual rights to seek assignment of various 218-219 Service authorizations are part of the bankruptcy estate and has authorized and directed the Trustee to seek Commission approval of the assignment of those licenses, **subject to any and all indebtedness due and owing to the [FCC] and shall further be subject to the FCC regulatory process.**" U.S. Telemetry Corporation subsidiaries have filed applications to seek assignment of certain of those licenses. The applications include the express commitment by U.S. Telemetry to pay in full all indebtedness to the Commission. However, the Wireless Bureau staff has expressed an unwillingness to process, much less grant those applications.

Policy Option: The Commission should process the Wincom assignment applications, consistent with precedent requiring that the Commission reconcile its licensing policies under the Communications Act with those of the federal bankruptcy laws. La Rose v. F.C.C., 494 F.2d 1145 (D.C. Cir. 1974).

- U.S. Telemetry finally offers a viable technology solution for a service that has to date been characterized by hyperbole, false promises and undercapitalized licensees, all of which have resulted in the spectrum's lying fallow for 6 years since the initial licenses were awarded.
- U.S. Telemetry has received the right to seek Commission approval of the assignment of those licenses upon an express finding by the Bankruptcy Court that those contractual rights are part of the Wincom estate.
- The proper forum for the resolution of contractual disputes regarding the right to seek assignment of the licenses which parties agreed to sell to Wincom is the Bankruptcy Court. The Commission has long held that it "is not the appropriate forum for the adjudication of rights in a private controversy." Transcontinent Television Corp., 44 FCC 2451 (1961).
- The Commission defers to judicial determinations regarding the interpretation of contracts for the sale of licenses because "the Commission does not possess the resources, expertise, or jurisdiction to adjudicate such questions fully..." Arecibo Radio Corp., 101 FCC 2d 545 (1985).
- The Supreme Court has held that it did "not read the Communications Act to give authority to the [FCC] to determine the validity of contracts between licensees and others." Regents v. Carroll, 338 U.S. 586 (1950).
- Unlike some of the C-Block license cases, U.S. Telemetry does not seek to usurp the financial obligations of licensees to the Commission: Consistent with the directive of the Bankruptcy Court, U.S. Telemetry is fully committed to resume the installment payments for the Licenses under the Commission's new installment payment restructuring.
- In resisting a solution which could result in full repayment of 218-219 Service licensee obligations, the Wireless Bureau staff is ignoring years of precedent requiring that it cooperate with the bankruptcy and other federal courts and their jurisdiction and power to interpret contracts and contractual rights.
- The Wincom licenses should not be subjected to special treatment at variance from precedent requiring comity between the Commission and the bankruptcy courts.